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No. _____

IN THE

Supreme Court of The United States

JESUS TORRES-TORRES

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER THERE WAS PREJUDICIAL ERROR IN THE ADMISSION OF A STATEMENT BY A THIRD PARTY RESULTING IN AN ERRONEOUS INSTRUCTION TO THE JURY.

II

WHETHER THERE WAS SUCH PREJUDICE IN THE JURY INSTRUCTIONS THAT PETITIONER IS ENTITLED TO A REVERSAL.

INDEX

PAGE

Questions Presented..... i

Opinions Below..... 1

Jurisdiction..... 2

Statute Involved..... 2

Statement of Case..... 2

Statement of Facts..... 5

Reasons For Granting Writ..... 7

Conclusion.....25

Appendix A

Order of MERRILL and KENNEDY, Circuit Judges, and KING, Chief District Judge United States Court of Appeals for the Ninth Circuit of June 26, 1982.....A-1

Opinion of MERRILL and KENNEDY, Circuit Judges, and KING, Chief District Judge United States Court of Appeals for the Ninth Circuit of June 26, 1982.....A-3

TABLE OF CASES

PAGE

Mutual Life Insurance Co. v. Hillmon
145 U.S. 285, 295-96 (1891).....12,16, 19,A-15

United States v. Pheaster,
544 F.2d 353, 374-80 (9th Cir. 1976) cert. denied, 429 U.S. 1099 (1977)..13,14, 19,A-15, A-16

United States v. Jenkins,
579 F.2d 840, 842-44 (4th Cir.) cert. denied, 439 U.S. 967 (1978)...13,A-15

Nash v. United States
54 F.2d 1006, 1007 (2nd Cir. 1932)..15,A-17

Vacaro V. United States
461 F.2d 626 at 635 (5th Cir. 1972).22

Chapman v. California
386 U.S. 18 at 44, 87 S.Ct 824 at 838 17 L.Ed.2d 705 at 721-22.....22,24

Kottemkos v. United States
328 U.S. 750.....23,24

Beck v. Ohio
379 U.S. 89, 91 (1964).....A-10

United States v. Gardner
627 F.2d 906, 911 (9th Cir. 1980)...A-11

United States v. Coates
495 F.2d 160, 165 (D.C. Cir. 1974)..A-11

Michigan v. Tyler
436 U.S. 499, 510 (1978).....A-11

Coolidge v. New Hampshire
403 U.S. 443, 465-66 (1971).....A-12

PAGE

United States v. Jewell
532 F.2d 697 (9th Cir.)(en banc)
cert. denied, 426 U.S. 951 (1976.....A-19

United States v. Erwin
625 F.2d 838, 841 (9th Cir. 1980).....A-20

United States v. Batimana
623 F.2d 1366, 1369 (9th Cir.)
cert. denied, 499 U.S. 1038 (1980)....A-20

United States v. Heiden
508 F.2d 898, 902 (9th Cir) 1974.....A-21

STATUTES

Fifth Amendment of the Constitution
of the United States..... 2

Title 28 U.S.C. Section 1254(1)..... 2

Title 21 U.S.C. Section 846..... 2

Title 21 U.S.C. Section 841(a)..... 3

Title 18 U.S.C. Section 111..... 3

Title 18 U.S.C. Section 924(c)(2)..... 3

Federal Rules of Evidence, Rule 803.....12

Federal Rules of Evidence, Rule 803(3)..19,A-22

Federal Rules of Evidence, Rule 801.....A-14

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO._____

JESUS TORRES-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jesus Torres-Torres, the Petitioner herein, prays, that a Writ of Certiorari issue to review the denial of appeal by the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on July 26, 1982 and the Court's denial of Petitioner's petition for rehearing and suggestion for rehearing en banc on September 20, 1982.

OPINIONS BELOW

The opinions of the Court are printed in Appendix A hereto, infra, pages A-1 through A-24.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied Petitioner's timely appeal on July 26, 1982 (Appendix A, infra, page A-1). A timely petition for rehearing was denied on September 20, 1982. The jurisdiction of the Supreme Court is involved under Title 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> "(No person shall) be deprived of Life, Liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

This is an appeal by Jesus Torres-Torres from a conviction of conspiracy to unlawfully distribute heroin, a violation of Title 21, United States Code, Section 846; a conviction of possession with intent to distribute heroin, a violation of

Title 21, United States Code Section 841(a); a conviction of assaulting with deadly weapons special agents of the Drug Enforcement Administration, a violation of Title 18, United States Code Section III; and a conviction of unlawfully carrying a firearm during the offense of possession with intent to distribute heroin, a violation of Title 18, United States Code, Section 924(c)(2).

An indictment was filed on June 19, 1980, with the Clerk of the United States District Court for the Eastern District of California.

On June 23, 1980, appellant was arraigned and entered a plea of not guilty.

On November 12, 1980, jury trial commenced.

On November 25, 1980, the jury returned a guilty verdict on all four counts.

On December 19, 1980, the Court sentenced appellant to twelve years on Counts I and II each to be served concurrently and

to three years on Counts III and IV each, said three years to be consecutive to the twelve years' sentences.

Appellant is currently incarcerated.

On January 19, 1981, petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeals.

On March 15, 1982, a panel of the Ninth Circuit Court of Appeals reversed petitioner's conviction of Counts I and II and remanded the case for a new trial.

On March 27, 1982, the government filed a Petition for Rehearing and Suggestion for Rehearing en banc.

On May 21, 1982, a panel of the Ninth Circuit Court of Appeals directed petitioner to respond to the issue of whether a certain statement was inadmissible hearsay.

On July 26, 1982, the same three judge panel of the Ninth Circuit reversed its own opinion of March 15, 1982. The court withdrew its March 15, 1982 opinion, affirmed

petitioner's conviction of Counts I, III and IV and reversed petitioner's conviction of Count II.

On August 9, 1982, petitioner filed a Petition for Rehearing and Suggestion for Rehearing en banc.

On September 20, 1982, the Ninth Circuit Court of Appeals denied this petition and rejected the Suggestion for Rehearing en banc.

STATEMENT OF FACTS

On June 11, 1980, Petitioner, along with Rafael Astorga-Torres, was arrested at the Sky Ranch Motel in Tulare County, California.

The three men had driven up on that day from Los Angeles and had been under government surveillance during their entire trip.

Agent Delgado testified that on June 10, 1980, he had entered into an agreement with Mr. Ambriz to purchase fifteen

ounces of heroin.

Agent Delgado further testified that Ambriz said he would be bringing someone to guard him.

Despite objections by the defense, Agent Delgado was allowed to testify as to his previous heroin dealings with Ambriz.

Agent Delgado met with Ambriz in front of Room 7 at the motel where Ambriz showed him a bag containing heroin.

Subsequently, Ambriz was arrested.

A gun battle erupted between government agents and an occupant or occupants in Room 4 where Petitioner and Rafael Astorga-Torres were staying.

Petitioner and Rafael Astorga-Torres came out of Room 4 with Petitioner crawling as a result of his wounds.

Agent Delgado further testified that appellant told him that the appellant had thought that the law enforcement officers were robbers and that Delgado thought

appellant was going to die.

Appellant's room was searched without a warrant.

The car in which appellant had driven from Los Angeles revealed no heroin.

On or about August 8, 1980, Agent Delgado searched the motel septic tank system, in which Room 4 along with three other rooms emptied, and retrieved two torn condoms tied at the top and one untorn condom containing one ounce of heroin.

REASONS FOR GRANTING WRIT

At the conclusion of the trial, the judge instructed the jury, not once, but twice, over the objections of trial counsel, as follows:

> "So, if you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County -- I think that I am going to make it. If you find that a defendant now on trial was

not in possession when it was brought to Tulare County, but you find that the defendant was present to guard Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the indictment if you find beyond a reasonable doubt that the defendant, one, acted with a conscious purpose to avoid learning that Ambriz was going to be selling heroin, and, two, was subjectively aware of a high probability that Ambriz was to sell some heroin.

"I am to read this to you again because its -- you've got to deal with this instruction carefully and deliberately. If you find that a defendant now on trial was not in possession of the heroin when it was brought to Tulare County but you find that

the defendant was present to guard Ambriz, you may still find the defendant guilty as to the offense charged in Count II of the indictment if you find beyond a reasonable doubt that, one, the defendant acted with a conscious purpose to avoid learning that Ambriz was going to be selling heroin, and two, was subjectively aware of a high probability that Ambriz was to sell some heroin.

"Thus, actual or positive knowledge is not necessary to convict the accused if he was subjectively aware of a high probability of the crucial fact, namely that Ambriz was to sell some heroin, even though he consciously or deliberately disregarded that probability in an effort to remain ignorant of the fact."

In its opinion dated March 15, 1982, the Ninth Circuit of Appeals panel reversed Appellant's conviction on Counts I, II and IV, affirmed the conviction on Count III and remanded the case to a new trial.

The Ninth Circuit reversed on Count II (possession) on the correct conclusion that the trial court's instruction on possession by using the so-called Jewell Instruction was "....far from harmless...." (Court's opinion, page 8, dated March 15, 1982).

The Ninth Circuit reversed on Count I (conspiracy) again in the correct conclusion that the trial court erred in admitting certain statements and concluded reversible error as follows:

> "As to Ambriz's earlier statements, only his comment that he intended to bring guards with him to Tulare was really prejudicial. That statement could properly be admitted in a preliminary hearing before the

judge to establish that the agents had probable cause to suppose that appellants were parties to the action and subject to arrest. However, upon the issue of guilt of conspiracy the statement was inadmissible as hearsay since it was made prior to the existence of any conspiracy so far as the record has established. The judge acknowledged this state of the record, but nonetheless invited the jury to find that such a conspiracy existed, and instructed that if they did so find they might consider the statement for any purpose. We agree with appellants that this constituted reversible error." (Court's opinion, page 7 dated March 15, 1982).

The government filed a petition for rehearing and argued that the statements of

Ambriz were properly admitted.

On July 26, 1982, the same panel of the Ninth Circuit Court of Appeals reversed itself and, while acknowledging error was "harmless" and held as follows:

> "As to Ambriz's earlier statements, only his comment that he intended to bring guards with him to Tulare was really prejudicial. That statement was properly admitted as evidence of Ambriz's intent under Rule 803, Fed.R.Evid. Rule 803 follows the holding in Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-96 (1891), to the effect that a statement of the declarant's intent to do something is competent "not as (a) narrative() of facts communicated to the (declarant) by others, nor yet as proof that he actually (did as he intended,) but as evidence that * * * he had

the intention of (so doing)." Evidence of that intent can then be considered by the jury in determining whether the declarant subsequently performed the intended act. To the same effect, United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977) (applying Hillmon before Federal Rule of Evidence were in effect); United States v. Jenkins, 579 F.2d 840, 842-44 (4th Cir.) cert. denied, 439 U.S. 967 (1978). Here an appropriate limiting instruction was given. Accordingly we conclude that Ambriz's statement was properly admitted not as proof in fact he did bring guards with him to Tulare (or that appellants were those guards) but as evidence that he had the intent to do so, from

which evidence inferences could properly be drawn by the jury. For this purpose the statement was admissible and relevant as to the other defendants. See United States v. Pheaster, supra. With respect to the same statement of Ambriz, the judge further instructed the jury that if they found that a conspiracy existed between Ambriz and Appellant Astorga-Torres at the time the statement was made, then as to that appellant they could consider the statement "for all purposes" as the declaration of a co-conspirator. Arguing that the record is devoid of any evidence from which it could be concluded that a conspiracy existed at that time, Appellant Astorga-Torres assigns the giving of this instruction as error. We accept, arguendo,

this contention of error but hold it to have been harmless. The line between use of a statement as proof that the intended act was in fact ultimately performed (improper use) and its use as basis for an inference to that end (proper use) is at best tenuous. Cf. Nash v. United States, 54F.2d 1006, 1007 (2nd Cir. 1932) (such limiting instructions demand of jury "mental gymnastic(s)"). If indeed the jury understood the instructions as an invitation to take the short step from permissible inferences to impermissible deduction, its limited impact was overshadowed by the abundant evidence that appellant was engaged in some sort of joint enterprise with Ambriz - evidence from which it could be inferred that appellant's function in that

> enterprise was such as to call for him to be armed and ready to use armed force to protect against instrusion into the affairs of the enterprise. In our view the more probable effect of the instruction, however, was to call the attention of the jury to the fact that Ambriz's statement was not entitled to conclusive weight as proof of anything. Under these circumstances, we conclude that any error in the instruction was harmless."

The Ninth Circuit therefore concluded that the United States Supreme Court in its decision of Mutual Life Insurance Co. v. Hillmon, (1891) 145 U.S. 285, 295-96 permitted such jury instructions and evidence to come in.

Appellant argued that this is simply an incorrect reading and application of the Hillmon Doctrine.

It has already been demonstrated that the jury was invited to convict appellant of possession of heroin based on the jury finding that appellant knew or should have known what a third party (Ambriz) was doing. The Ninth Circuit has already reversed that conviction.

Now the issue is whether it was proper to invite the jury to convict appellant of conspiracy based on a statement made by Ambriz that he intended to bring unnamed guards with him and further inviting the jury to find that petitioner was one of the guards.

As pointed above, the Ninth Circuit was compelled to acknowledge that the record shows no evidence that a conspiracy existed at the time the statement was made. (Ninth Circuit Court of Appeals Opinion dated March 15, 1982, page 7, lines 9-17).

In its second opinion, the Ninth Circuit concluded that the statement was

properly admitted to show Ambriz's intent but not as proof that Ambriz brought guards (Ninth Circuit Court of Appeals Opinion dated July 26, 1982, page 7, lines 23-27).

Yet it was precisely to show that Ambriz brought guards with him and precisely to show that petitioner was one of the guards that the jury was invited to find based on the trial judge's instructions:

> "The statements may, however, be used by you to assess the conduct of Ambriz after he made the statements and may be considered by you to determine if he carried out his expressed intention to bring guards with him to Tulare on June 11, and did in fact have guards with him on that day in the persons of defendants here on trial.

The jury was told it could use the statements to find that he brought guards with him in the persons of appellants.

This is contrary to both Mutual Life Insurance Co. v. Hillmon, supra, and United States v. Pheaster, supra.

As earlier pointed out, the editorial comments contained in the United States Code Services Annotations regarding Section 803(3) pointed out:

> "However, the House Committee intends that the Rule can be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon (1891) 145 U.S. 285, 36 Lawyer's Edition 706, 12th Supreme Court 909, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the conduct of another person."

In the instant case, the trial judge instructed the jury not only as to the future conduct of Ambriz, but also as to the future conduct of appellant.

It is finally submitted that there

was extreme prejudice to appellant in the giving of the so-called Jewell instruction and that that instruction not only prevented appellant from receiving a fair trial on Count II (possession), but also on Count I (conspiracy).

There is, of course, no way of determining which Count the jury decided first or whether the jury did, in fact, use the Jewell instruction in connection with Count I as well as Count II. It would appear, however, that a jury could well find them inseparable.

What is certain is that both the government and the trial court felt that the Jewell instruction applied to both counts:

> "On page 1414 of the reporter's transcript (Volume 8) even Mr. Leighton concedes that the Jewell instruction applies to the conspiracy count. . . "because if the

defendants got together with Ambriz and talked about them guarding him, then the -- they cannot claim lack of knowledge of what they were to guard Ambriz for to negate the fact that they were co-conspirators if there was a high probability that they were subjectively aware of the high probability that when they met with Ambriz and decided what they were to do that they were going to be guarding Ambriz for the purpose of him consummating a heroin transaction. . ." and on page 1415 (Volume 8) the court agreed with Leighton and said: "I can't -- I really don't see the difference between the aiding and abetting count and the conspiracy count as it may be affected by this instruction. I think the two will go hand in hand, if the facts go

hand in hand. . . so what's the difference? If they are both the same. And I don't think that you can limit it just to count two. If you're going to use -- I think it applies to count one as much as it does to count two.""

The law in this area is very clear regarding both constitutional errors and non-constitutional errors.

FIRST it is well settled that errors involving an instruction which state an unconstitutional presumption are "harmful per se". See Vacaro v. United States, 461 F.2d 626 at 635 (5th Cir. 1972). "When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was no ample evidence apart from the presumption to sustain the verdict." Chapman v. California, 386 U.S. 18 at 44, 87 S. Ct. 824 at 838, 17 L.Ed.2d 705 at 721-22; Vacarro v. United States,

supra, at 635.

SECONDLY in Kottemkos v. United States, 328 U.S. 750, the United States Supreme Court held that a trial court's non-constitutional error will be considered harmless only when the court is sure that the error did not influence the jury or "had but very slight effect. . ." (emphasis added) at 66 S.Ct 1248. The court stated:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself

had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

supra at 66 S.Ct. 1248

The Ninth Circuit, in its opinion of July 26, 1982, suggested that any error was cured by the "abundant evidence that appellant was engaged in some sort of joint enterprise". (Court's Opinion, page 8, dated July 26, 1982)

The United States Supreme Court has held that the fact that the appellate Court believed the appellant guilty is not enough to casually dismiss an error as harmless. See Kottemkos v. United States, (1946) 328 U.S. 750, 763.

One inevitably returns to this court's opinion in Chapman v. California, supra, and the constitutional questions whether the error or errors were harmless beyond a reasonable doubt.

It is submitted that the answer must

be no and Petitioner is entitled to a new trial free of constitutional error.

CONCLUSION

For all the foreclosing reasons it is submitted that Petitioner is entitled to a reversal on Counts I, II and IV.

Respectfully submitted,

CARL M. STEIN

CERTIFICATE OF SERVICE

I, Deborah A. Appel, a resident of the County of Sacramento, State of California and over the age of eighteen (18) years, hereby certify that on this 18th day of November, 1982, I served three (3) copies of the foregoing "Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit" by placing said copies in the U.S. Mail, upon the Solicitor General, Rex E. Lee, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.



Deborah A. Appel

I, Deborah A. Appel, do hereby say as follows:

1. That on November 18, 1982, I deposited in a United States Post Office with first class postage prepaid, and properly addressed to the United States Supreme Court, I mailed this Petition for Writ of Certiorari. Said mailing was done at the Federal Post Offices, 2000 Royal Oaks Drive, Sacramento, California.

Dated: November 18, 1982.

Deborah A. Appel

Sworn to and subscribed before me on the above written date.

Betty S. Nakayama

